

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of)
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)

INDIANA HOUSEHOLD MOVERS)
AND WAREHOUSEMEN, INC.,)
)

a corporation.)
)

File No. 021-0115

**PUBLIC COMMENTS OF
CITIZENS FOR VOLUNTARY TRADE**

Pursuant to the March 18, 2003, request for public comments on the proposed Consent Order with Indiana Household Movers & Warehousemen, Inc. ("IHM"), Citizens for Voluntary Trade submits the following comments.¹

Material Facts

IHM is an Indiana trade association, composed of approximately 70 independent movers, which promotes Indiana's moving industry. Among IHM's activities is the development and filing of tariffs, which are documents listing an individual mover's rates. The Indiana Department of Revenue requires all movers in the state to file a tariff, which in turn establishes the rates paid by consumers for moving services.

The FTC alleges IHM's joint tariff-filing activities violate section 5 of the FTC Act, which generally prohibits "unfair methods of competition" in interstate commerce. The FTC claims consumers were deprived "of the benefits of competition," because IHM essentially fixed rates among its members by coordinating their tariff filings. Among other allegations, the FTC says IHM is guilty of "Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, which have the purpose or effect of fixing, establishing, stabilizing or otherwise tampering with rates and charges for the transportation of household goods between points within the State of Indiana."

Although IHM's tariff activities only deal with commerce *within* the state of Indiana, the FTC claims interstate commerce jurisdiction. The FTC says IHM's actions "[a]ffect the flow of substantial sums of money" across state lines, and that IHM members use the United States mail "and other instruments of interstate commerce" in furthering their tariff activities.

The proposed order would resolve the FTC's allegations by requiring IHM to cease preparing any tariff filings for its members. In addition, the proposed order restricts the flow of

¹ Citizens for Voluntary Trade is a nonprofit association organized under District of Columbia law.

information among IHM members. IHM is banned from “[i]nviting, coordinating or providing a forum (including publication of an informational bulletin) for any discussion or agreement between or among competing carriers concerning rates charged or proposed to be charged by carriers for the intrastate transportation of property or related services, goods or equipment.”

The proposed order also requires IHM to amend its articles of incorporation, bylaws, “and every other rule, opinion, resolution, contract or statement of policy” that promotes tariff activities prohibited by the settlement. The proposed order requires IHM to file annual reports on their compliance for five years, and the order itself will terminate after 20 years.

Comments

The antitrust laws, which include the Federal Trade Commission Act, were enacted under Congress’s power to “regulate commerce...among the several States.” The interstate commerce power is one of the broadest and most important grants of authority to the federal government, and as such, executive agencies must take great care in ensuring they do not act beyond the intended scope of the clause’s mandate. In this case, the FTC clearly exceeded the interstate commerce power, and for this reason, the proposed Consent Order should be withdrawn in the public interest.

Congress’s exclusive authority to regulate interstate commerce stems from the Framers conclusion that, left to their own devices, state governments would likely resort to various restrictions on the flow of goods and service across state borders. The interstate commerce clause charges Congress with ensuring there is one national commercial market, not fifty separate markets trying to tariff and regulate one another to death. Beyond this mandate, however, the clause does nothing to invest the federal government with any general “public interest” mandate. Indeed, nothing in the Constitution permits the United States to act in any respect save the protection of *individual* rights.

In this case, IHM is charged with thwarting interstate commerce by means of a voluntary scheme to jointly file tariffs with the State of Indiana. It is unclear from the factual record what the precise motivation for IHM’s actions were. The FTC argues IHM engage in price fixing, something the government considers a *per se* violation of the antitrust laws. But viewing the facts presented in the light *most favorable* to the FTC, there is insufficient reason to conclude IHM engaged in price fixing.

IHM provided a common forum for member businesses to discuss industry concerns, which possibly included prices. The mere existence of such a forum does not violate the antitrust laws, and indeed such discussions are protected conduct under the First Amendment. The FTC does not allege IHM used any coercive means to obtain agreements from members on pricing policies, nor for that matter is there any evidence IHM members entered into express or implied contracts to fix prices. Even if such contracts did exist, that would not prove a violation of the antitrust laws, since businesses have the basic right to decide for themselves which prices to charge in the marketplace. Whether such pricing decisions are arrived at in seclusion or in consultation with competitors is an irrelevant detail, since ultimately consumers decide which services to purchase.

The antitrust laws prohibit, in vague terms, "restraint" of trade and "unfair" competition. IHM's alleged actions fall into neither of these categories. A restraint of trade implies a business employs some *coercive* means of preventing another business from attempting to compete within the market. In classical monopoly theory, a restraint is created by the government (or some other employer of force) imposing a barrier to entry. For example, the legal profession, acting under color of government, employs a restraint of trade by requiring potential entrants to take the bar exam. IHM has no such power. There is nothing in the record which demonstrates IHM can exclude competitors from entering the moving market. Nor would a private agreement to coordinate pricing policies create such a barrier, since nothing would prevent a new firm from entering the market and ignoring IHM's standards.

As to the question of whether IHM's acts constitute "unfair" competition, it should be noted that IHM was simply complying with Indiana law. The state requires all movers to submit their price lists to the Department of Revenue in the form of a tariff. Since there is mandated open price disclosure, it's hard to see how IHM's actions are "unfair" in the ordinary sense of the word. Nothing was being done in secret, and indeed interested consumers could easily obtain information on movers. There was no "unfair" surprise or deception involved.

If there is any restraint of trade at work here, it is in the Indiana tariff requirement. Since the state prevents movers from charging any rate outside the stated tariff, IHM's members are effectively restrained from dealing with potential customers on a voluntary basis. For instance, a mover could not charge a lower rate to certain customers without violating the tariff, even though such pricing flexibility may benefit both consumer and producer. The tariff requirement also places an administrative burden on movers, forcing them to divert resources that could be put to better use elsewhere.

In fact, the most likely explanation for IHM's joint tariff filing policy could be membership convenience. Trade associations often provide collective administrative services for members in order to reduce costs (which in turn can reduce prices.) It would certainly be more efficient for one organization to handle tariff filing than to have each firm do so separately. So long as each business is free to decide for themselves what to charge—and the FTC has not alleged otherwise here—the mechanics of the filing is itself a mere incidental detail.

Given all this, it's clear the FTC has no authority to take action against IHM. Nothing in IHM's conduct impedes interstate commerce in the sense the Constitution envisions this concept. IHM simply provided its members with a simpler means of complying with Indiana law. The FTC believes, incorrectly, that IHM's actions impeded interstate commerce by "frustrating price competition," but this claim—which is unsubstantiated—does not by itself give rise to an interstate commerce claim under the Constitution. The Constitution requires the federal government ensure a uniform national marketplace; it does not mandate the imposition of certain price policies upon businesses. Indeed, restricting the ability of IHM members to peaceably assemble and discuss topics of mutual interest violates every basic concept underlying the Constitution's guarantee of individual rights. There is no constitutional "freedom from higher prices." There is, however, a freedom of speech and assembly. The FTC must recognize this distinction, and act accordingly.

Conclusion

For the reasons discussed above, the proposed Consent Order is unjustified, unreasonable, and unnecessary. IHM's alleged actions do not run afoul of the antitrust laws, and the proposed Consent Order would severely infringe upon the constitutional rights of IHM and its member businesses. The proposed Consent Order should be withdrawn, and the FTC should dismiss its complaint with prejudice.

Respectfully Submitted,
CITIZENS FOR VOLUNTARY TRADE



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